declaration (sic) at Page 173, Lines 5 to 16, but the Court was not presented with any evidence that customers actually consummated transactions online.

There has been no evidence provided as to the billing link or the frequency of use of either the billing or the orders link, and whether or not they've ever been used to purchase products or used by the veterinarians in New Jersey, or others in New Jersey.

Shortly before his death in April of 2001, D. Barclay Slocum transferred the T.P.L.O. patents to the Slocum Trust. The Slocum Trust is situated in Oregon and it owns no assets outside of that state. See Ms. Slocum's declaration at Paragraph 4. Its primary beneficiaries are Slocum family members, including its sole trustee, Ms. Slocum. See her declaration at Paragraphs 1 to 4. The Trust has no beneficiaries, employees, representatives, properties, or other assets in New Jersey. See her declaration at Paragraph 4.

Since 2001, after a veterinarian completed a training seminar conducted by Slocum Enterprises, the Slocum Trust would enter into a "user license agreement." To date, the Slocum Trust has entered into at least seven such agreements with New Jersey veterinarians. The user license agreements grant the veterinarians a non-exclusive license to use Slocum Enterprises' patented devices. See Mr. Christie's

declaration at Exhibit I, Bates No. 02920. See also Ms. Slocum's declaration at Paragraph 6.

The user license also obligates the licensee to purchase such devices from Slocum Enterprises. See Mr. Christie's declaration, Exhibit I, at Bates 02921, Paragraph 4.1, which is a portion of the license that's given to the veterinarians who complete the seminars.

It also stipulates to the validity of the -- strike that --

The license agreement also requires the licensee to stipulate to the validity of the patent embodied in the devices; see Paragraph 5 of the license; give Slocum the right to monitor the licensee's use of the product; see Paragraph 6.1; obligates the licensee to use its best efforts to use the devices in accordance with the techniques taught at the seminars; see Paragraph 6.2 of the license, and obligates the licensee to notify the patent holder of "any unauthorized activity" with respect to the patented devices. See Paragraph 9.

Notably, the user license agreements contain a choice of law and forum selection provision, which chooses Oregon law and requires disputes to be resolved in Oregon. See Paragraph 11.4 of the license agreement, and this one happens to appear in Bates No. 02924. The Court notes that of course New Generation is not a licensee and is not a party

to these forum selection clauses or choice of law provisions, but it indicates at least what the Slocum Trust believed the forum it would litigate its dispute with the veterinarians would be.

Defendants assert that Slocum Trust and Slocum Enterprises are separate legal entities, with separate records, income, and expenses. See the declaration of Ms. Slocum at Paragraph 4. Defendants assert that Slocum Trust takes no part in the enrollment or administrative aspects of the training seminars and does not solicit any attendees or licensees, and after the executing the agreement has no further contact with the veterinarians. See Ms. Slocum's declaration at Paragraph 6.

Slocum Enterprises is wholly owned by the Slocum Trust, and pursuant to the user license agreement, Slocum Enterprises pays Slocum Trust a fixed licensing fee of $1,000 for every patented device it sells for more than $2,000. See Mr. Christie's declaration, Exhibit C, the deposition at Page 187, Lines 15 to 24, and 189, Lines 2 to 10.

Slocum Trust is the sole shareholder of Slocum Enterprises and so all profits of Slocum Enterprises flow to the Slocum Trust. See Mr. Christie's declaration, Exhibit C, Page 189, Lines 2 through 11. I note that there's been some argument about what that factor can be used to show, but it's undisputed that that's how the monies do flow.

In another lawsuit, Slocum Enterprises and the Slocum Trust sued New Generation in the United States District Court for the District of Oregon for infringement of the patents in suit. Slocum filed that complaint on February 12th, 2004. See the Slocum declaration at Paragraph 12. The District Court dismissed the complaint for lack of personal jurisdiction over New Generation and at other events with the parties, the Court has been advised that that is the subject of an appeal to the Federal Circuit.

On June 2nd, 2004, before the Oregon case was dismissed, the plaintiff, New Generation, here filed this action for a declaratory judgment for non-infringement, unenforceability, and invalidity. The defendants filed their original motion to dismiss or transfer this action on September 20th, 2004. The defendants agreed to withdraw that motion without prejudice because of their delay in responding to jurisdictional discovery.

During jurisdictional discovery, the Slocum Trust and Slocum Enterprises answered approximately 20 interrogatories and document demands and Ms. Slocum was deposed for two days. See the Slocum declaration at Paragraph 14. On April 6th, 2005 the defendants filed the motion that we have before the Court now, which is the motion to dismiss the case for lack of personal jurisdiction. There was no request that the Court entertain transfer as part of

the motion.

In support of the motion, the defendants have argued both in their papers and in court today that neither the Trust nor the Enterprises has sufficient minimum contact with New Jersey, and that exercising jurisdiction over them would violate due process. Specifically, defendants argue that Slocum Trust's New Jersey contacts are limited to the seven T.P.L.O.s certified New Jersey veterinarians with whom it has user license agreements. That was what was said in their brief at Pages 11 to 12. I note for the record that here today there's been a suggestion that over time there's been up to 11 licensees of the total of 992 licenses that the Trust issued.

In any event, the defendants argue that Slocum Trust did not purposely avail itself to New Jersey because it did not solicit any New Jersey veterinarians, the user license agreements select Oregon law, and choose the Oregon forum for disputes. The agreement allows New Jersey certified veterinarians to practice not in New Jersey, but anywhere in the world, and the Trust had no further contact with the veterinarians after the execution of the license agreement. See the brief at Pages 12 to 13.

The defendants argue, therefore, this action should be dismissed as to the Trust. The defendants also argue the Enterprises lack minimum contacts with New Jersey

because it is based in Oregon, conducts seminars largely in Oregon, and never had one in New Jersey, does not advertise nationally, but relies on customers seeking information from it in Oregon, and its sales in New Jersey account for less than 1 percent of its total sales between 2001 and 2004. See its brief at Page 14.

Moreover, defendants argue Slocum Enterprises' website, which does not allow customers to purchase products, but allows customers to enter their contact information to receive product and seminar information is passive and, therefore, cannot form the basis of general personal jurisdiction. See their brief at Page 16. I note, however, that there was a reference by Ms. Slocum during her deposition to suggest that one could get a videotape through the website, suggesting that you could actually order it and have it delivered to you. Whether there was a fee for that, however, is not clear from the information submitted to the Court.

Thus, defendants have argued that the Enterprises does not have sufficient general personal jurisdiction contacts with New Jersey. The defendants further argue that even if the plaintiff were to establish sufficient minimum contacts, the burden of forcing them to litigate in New Jersey would violate due process. See their brief at Page 17. They assert that the Slocum Enterprises are small,

centrally located in Oregon, and pursuing their patent rights in New Jersey would be unduly burdensome for the entities and for Mrs. Slocum who controls them.

Moreover, the defendants argue that the -- Oregon's interest in providing a forum for its residents to assert their patent rights is greater than New Jersey's interest in providing its resident a forum for defending against such claims or seeking a declaration as the type here sought.

Defendants argue since two of the three parties are on the west coast and since the patents were developed and practiced there, resolution would be more efficient in Oregon and for all those reasons, they argue that having jurisdiction in New Jersey would violate due process.

In opposition, the plaintiffs have argued the defendants targeted the New Jersey veterinarians by training, certifying, and licensing them with the T.P.L.O. technique and maintain a monopoly over New Jersey licensees to market their devices and the T.P.L.O. procedures. See the plaintiff's brief at 9 and 10.

During oral argument today, counsel for the plaintiff further elaborated about the way that the defendant directed its interest in those in New Jersey to use its devices, by the way the website was set up and the fact it specifically identified veterinarians in New Jersey who

practice the procedure and provide the implements for doing it.

Plaintiffs argue that personal jurisdiction is proper over the Trust because it signed a user licensor agreement with at least seven New Jersey veterinarians, again, this is how it's been characterized in the brief, thereby creating a growing demand for New Jersey veterinarians that were required to Slocum Enterprises products. See their brief at Pages 10 to 11.

I note for the record that again today it was made clear that the number of licensees in New Jersey over the period 1999 to June 2nd, 2004 is 11.

Since the Trust funds Slocum Enterprises, plaintiff argues the Trust benefitted from Enterprises's increased sales. The plaintiff has also argued that the Enterprises historically has had 14 New Jersey new customers, at least half of which have been active, and that there have been steady increases in New Jersey sales, for which a total of 143 invoices were mailed to New Jersey and that this demonstrates substantial contacts with this District. See Pages 11 and 12 of the brief.

Moreover, plaintiff argues defendant Slocum Enterprises's website is sufficiently interactive to assert personal jurisdiction over the defendants. Plaintiff argues by listing certified veterinarians by state, the website

entices New Jersey customers and advertising Slocum Enterprises to procure products from Slocum Enterprises. See their brief at Page 12. And I note this further elaborated here in court today.

Plaintiff argues that the website's capacity to enter information and its listing of Slocum Enterprises's contact information and e-mail address for which the public can communicate with Enterprises, makes it interactive in nature and, therefore, sufficient to confer personal jurisdiction over Slocum Enterprises in New Jersey. See plaintiff's brief at Page 13.

Plaintiff further argues there is specific personal jurisdiction over the defendants because the cause of action arises out of a dispute over the very patents from which defendants profits through their product sales and licensing agreements in New Jersey. See their brief at Page 16.

Plaintiff also argues, "There is such an indistinguishable relationship between Slocum Enterprises and Slocum Trust that the company's contacts with New Jersey residents should be attributed to Slocum Trust for the purposes of determining personal jurisdiction." See their brief at Page 17.

In short, they're suggesting that they're -- the plaintiffs are suggesting that there is -- the defendants are

alter egos of each other and, therefore, the corporate niceties should be pierced and you should be able to attribute the contacts that one has to the contacts that the other has.

Plaintiff argues personal jurisdiction is consistent with due process because the inconvenience would be only to Mrs. Slocum who controls both the defendants. Plaintiffs argue New Jersey has an interest in providing it with a forum to adjudicate its rights with respect to the patents in suit and that New Jersey -- proceeding in New Jersey would not unfairly burden the defendants, and for all these reasons, they argue personal jurisdiction is proper.

The defendants in their reply argue there's no basis for specific personal jurisdiction because neither defendant has directed activities to New Jersey residents, but rather from their perspective, all the contact came from New Jersey veterinarians who looked to contact the defendants.

The defendants further argue that plaintiff's allegedly infringing conduct does not arise form its New Jersey sales and, therefore, these contacts cannot form the basis of specific personal jurisdiction. They also argue in reply that finding personal jurisdiction would not be fair or reasonable. They further argue that the Slocum Trust is not a -- strike that.

They further argue that Slocum Trust is a distinct legal entity and not an alter ego of Enterprises, and that the trust has virtually no contact with New Jersey and cannot be subject to personal jurisdiction and, therefore, the case should be dismissed under Rule 19A for failure to join an indispensable party.

As you can tell from the questions at argument, I was not probing that topic and so I didn't -- and it was a new argument raised only in reply. I don't recall that being raised in the main papers, so I have not accounted -- I have not taken into account that argument.

The defendants argue the plaintiff has exaggerated Enterprises contacts in New Jersey and that its sales represent less than 1 percent, and neither of these can form a basis for specific general jurisdiction. And finally, they argue that while the website allows entry of information and requests for product information, it is not used to transact business and, therefore, does not have the requisite interactiveness to form the basis for personal jurisdiction in New Jersey.

Federal Circuit law governs personal jurisdiction issues in patent cases. Silent Drive, Inc. v. Strong Industries, 326 F.3d 1194 at 1201 (Fed. Cir. 2003), Hildebrand v. Steck Manufacturing Co., 279 F.3d 1351, 1354 (Fed. Cir. 2002).

In determining whether personal jurisdiction exists over a foreign defendant, the Federal Circuit considers; one, whether or not the forum state's long arm statute permits service of process on the defendant; and two, whether or not asserting personal jurisdiction over the defendant is consistent with due process. Inamed Corp. v. Kuzmak, 249 F.3d 1356, 1359-1360 (Fed. Cir. 2001).

New Jersey's long arm rule extends jurisdiction over nonresident defendants to the full extent permitted by the United States Constitution. Carteret Savings Bank, F.A. v. Shushan, 954 F.2d 141, 145 (3d. Cir. 1992).

The Federal Circuit applies the due process analysis and is developed under the Fourteenth Amendment rather than the Fifth Amendment, and the minimum contacts standard that arises from it. See LSI Industries, Inc. v. Hubbell Lighting, Inc., 232 F.3d 1369, 1375, Note 5 (Fed. Cir. 2000) citations omitted; Deprenyl Animal Health, Inc. v. University of Toronto Innovations Foundation, 297 F.3d 1343, 1350 (Fed. Cir. 2002). Thus, the Court must consider whether or not asserting personal jurisdiction over the defendants would violate the due process clause of the Fourteenth Amendment.

Personal jurisdiction under the due process clause of the Fourteenth Amendment requires proof of a sufficient "relationship among the defendant, the forum, and the

litigation..." Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

Stated differently, the defendant's contacts with the forum state should be such that it "should reasonably anticipate being hailed into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

Due process permits the assertion of personal jurisdiction over a defendant only if it has "minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe v. State of Washington Office of Unemployment Compensation and Placement, 326 U.S. 310, 316 (1945) internal quotation marks and citations omitted.

Thus, the Court must first consider whether or not minimum contacts exist. A plaintiff may show minimum contacts by demonstrating either general or specific jurisdiction. General personal jurisdiction "arises when a defendant maintains continuous and systematic contacts with the forum state even when the cause of action has no relation to those contacts." Trintec Industries, Inc. v. Pedre Promotional Products, Inc., 395 F.3d 1275, 1279 (Fed. Cir. 2005) internal quotation marks omitted; LSI Industries, 232 F.3d at 1375. See also Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-416 (1984).

To show specific personal jurisdiction, the

minimum contacts prong requires the plaintiff to show the defendant "has purposely directed his activities at the residence of the forum and the litigation result from alleged injuries that arise out of or relate to those activities." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-473 (1985). See also Trintec, 395 F.3d at 1279 stating, "specific jurisdiction arises out of or relates to the cause of action even if those contacts are isolated and sporadic..." internal quotation marks omitted; Deprenyl, 297 F.3d at 1350-1351, citations omitted.

Second, the Court must consider whether or not asserting personal jurisdiction over a defendant "offends traditional notions of fair play and substantial justice." International Shoe, 326 U.S. at 316.

The factors considered in determining whether personal jurisdiction would comply with fair play and substantial justice under the due process clause include; one, the burden on the defendant; two, the interests of the forum state; three, the plaintiff's interest in obtaining relief; four, the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and five, the shared interests of the several states in furthering fundamental substantive social policies." Asahi Metal Industries Co. v. Superior Court of California, 480 U.S. 102, 113 (1987), Deprenyl, 297 F.3d at 1355 citations

omitted.

The plaintiff bears the burden of proving that exercising personal jurisdiction over a defendant is proper. Where the parties have not conducted jurisdictional discovery, the plaintiff need only make a prima facie showing that personal jurisdiction exists and the court is to consider the pleadings and affidavits in the light most favorable to the defendant. Silent Drive, Inc. v. Strong Industries, 326 F.3d. 1194, 1201 (Fed. Cir. 2003).

Where, however, the parties have conducted jurisdictional discovery, the plaintiff must show personal jurisdiction by a preponderance of the evidence. Pieczenik v. Dyax Corp., 265 F.3d. 1329, 1334 (Fed. Cir. 2001). In this case, the parties have conducted jurisdictional discovery, both interrogatories and document demands, and the deposition of Ms. Slocum, and have submitted to the Court for its consideration documents and exhibits, including the deposition transcripts of Ms. Slocum related to the issue of personal jurisdiction. In addition, Ms. Slocum's declaration was submitted. The Court also considered oral argument given today and the information the parties represented to it.

Therefore, New Generation must bear the burden of proving personal jurisdiction by a preponderance of the evidence. See also Logan Farms v. H.P.H., Inc., 282 F.Supp.2d 776, 791 (S.D.Ohio 2003) which talked about the

standard of proof in a situation where there has been an opportunity to conduct jurisdictional discovery.

The Court now turns to the issue of general personal jurisdiction. The Supreme Court's various opinions on the issue of general personal jurisdiction "suggests very strongly that the threshold contacts required for general jurisdiction are very substantial indeed." Wright, Miller, Federal Practice and Procedure: Civil 2d, Section 1067, 3d Ed. 2002.

In determining whether a foreign defendant's activities within the forum are sufficient to find general personal jurisdiction, the Supreme Court has emphasized the following factors; one, being authorized to do business in the forum state; two, having an agent for service of process within the forum; three, selling products and soliciting business in the forum; four, signing contracts; five; recruiting employees from the forum state; and six, owning real or personal property in the forum state. Helicopteros, 466 U.S. at 411.

Applying these factors, the Supreme Court has held that the following combination of contacts are insufficient to assert general jurisdiction over a nonresident defendant. For example, simply sending a chief executive officer to the forum for one contract negotiation, or accepting into a bank account in the forum checks -- into another bank account

checks drawn from the forum state, purchasing equipment in the forum in indiscrete amounts, or sending personnel to the forum for training. See Helicopteros at Page 416.

The Court, however, has found that having director's meetings in the forum, having regular business correspondence, banking, stock transfers, the payment of salaries, purchases of machinery and the like are enough to make it fair and reasonable to subject a corporation to proceedings in the forum state. See Perkins v. Benguet Consolidating Mining Co., 342 U.S. 437, 445 (1952).

In short, to find general personal jurisdiction the plaintiff must demonstrate the defendants had the requisite substantial, continuous, and systematic general business contacts with the forum. See Helicopteros, 466 U.S. at 415-416.

These contacts must be "so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely distinct from those activities." International Shoe, 326 U.S. at 318.

It is through these principles that the Court first examines whether or not there is general personal jurisdiction over Slocum Enterprises. A survey of patent cases confirms that the contacts must be substantial to confer general personal jurisdiction over a foreign defendant. For example, the Federal Circuit affirmed without

opinion the District Court's determination that 3 percent of sales in the forum was insufficient to establish general jurisdiction. See Stairmaster Sports/Medical Products, Inc. v. Pacific Fitness Corp., 916 F.Supp. 1049, 1053 (W.D.Wa. 1994), affirmed 78 F.3d 602 (Fed. Cir. 1996).

In that case the court noted that where the defendant did not have offices, own property, pay taxes, manufacture its products, have employees, and was not registered to do business in Washington, its sales, advertising for distributors, and isolated visit by employees were insufficient to confer general personal jurisdiction. See also Adell Corp. v. Elco Textron, Inc., 51 F.Supp.2d 752, 757 (N.D.Texas 1999) which held there was no general personal jurisdiction in a patent case where sale of the products in Texas, through a Texas distributor, represented less than 1 percent of the total sales. See also Amana Refrigeration, Inc. v. Quadlux, Inc., 172 F.3d 852, 857 (Fed. Cir. 1999). In that case, the Federal Circuit affirmed the District Court's dismissal of claims over the foreign defendant for lack of personal jurisdiction because the defendant maintained no property in the forum and made very limited sales in the forum state, solicited sales through national publications, and sent an infringement letter to the declaratory judgment to plaintiff.

Patent cases also show that a defendant's contacts

are sufficiently substantial, and continuous, and systematic with the forum if it sold millions of dollars of products in the forum over several years, and had a broad distributorship in the forum. See for example, LSI, 232 F.3d. at 1375. See also 3-M Innovative Properties Co. v. InFocus Corp., Civ. No. 04-0009, 2005 WL 361494 at Page 3 (D.Minn. Feb. 9, 2005).

In that case, the District Court of Minnesota followed the guidelines of the Federal Circuit and found general jurisdiction, although the sales accounted for only .64 percent of the total sales because In Focus's sales amounted to millions of dollars of revenue in the forum and In Focus's representatives visited the state almost every other week and had contact with third parties to serve as authorized service centers. See also Synopsys, Inc. v. Ricoh Co., Ltd., 343 F.Supp.2d 883, 887 (N.D.Cal. 2003).

There, the District Court found general jurisdiction where the defendant maintained "a significant business presence in the forum (sales, manufacturing and research and development)," including the fact they had a wholly-owned subsidiary with a license to do business in the forum state and had a sales office there. See Engine Tech Co., Ltd. v. Advanced Engine Management, Inc., 270 F.Supp.2d 1189, 1194-1195 (S.D.Cal. 2003) where the court cited to Federal Circuit precedent and held sales that account for only 2 percent of a defendant's total business are not the

kind of systematic and continuous contacts that would warrant the exercise of personal jurisdiction. See AMP, Inc. v. Methode Electronics, Inc., 823 F.Supp. 259, 268 (M.D.Pa. 1993) where the court found general jurisdiction existed where the defendant's sales, although a small part of its total sales, and although sales were routed through sales agents located outside the forum were substantial and were on a regular basis, and this created a significant tie between the forum state and the defendant through the sale of its products in the forum.

Outside the patent cases, courts have found percentage of sales within the District at or below 2 percent to be insufficient to find the requisite substantial an systematic contacts with a forum to confer personal jurisdiction. See, for example, L.H. Carbide, Corp. v. Piece Maker Co., 852 F.Supp. 1425, 1435 (N.D. In. 1994).

In that case, they held general jurisdiction was improper because the defendant employed a sales engineer who lived in the forum state, oversaw the company's sales in 30 states, and visited Indiana customers every two to three months to ascertain whether they required anything of the company, and called on three to five customers per visit to Indiana, help the customers set up new product purchases, and had sales of 9 percent of its nationwide sales.

There are numerous cases and I don't want to labor

the record with those cases, holding that these amounts of less than 2 percent, when considered with other factors are insufficient.

The Court found at least another ten cases, and I certainly can put them on the record if counsel wants, that says this percentage is just not enough when you don't have other factors like a distributorship, regular visitors by a representative of the company, and things of that nature, but if counsel wants the citations for the benefit of the record I can read them in at a later time.

As in the above cases, Slocum Enterprises lacks the requisite substantial, systematic, and continuous contacts with New Jersey sufficient to confer general personal jurisdiction over it. Slocum Enterprises does not own property in New Jersey, pay taxes in New Jersey, maintain offices in New Jersey, have employees in New Jersey, nor is it registered to do business here.

Nothing in the record demonstrates Slocum Enterprises ever had any physical presence in New Jersey. Indeed, there is no allegation or evidence that any representative of Slocum Enterprises has ever come to New Jersey to solicit sales or for any other reason.

While the 143 invoices show commercial activity with New Jersey residents, its sales in New Jersey represent only .76 percent of the overall sales totalling approximately

$94,000 over a four-year period. See Mr. Christie's declaration, Exhibit C.

These activities, however, do not meet the systematic and continuous test, especially absent any other contacts as to sales representatives or an office in New Jersey, or even daily contact. See, for example, Modern Mailers, 844 F.Supp. 1050, 1051 in which the court held that $231,000 in sales over three years representing .5 percent of total sales was insufficient, even with other contacts with the state.

Accordingly, the Court finds Slocum Enterprises's New Jersey sales do not rise to the level of substantial, systematic, and continuous. In applying this analysis, the Court is mindful that small percentages of sales do not automatically preclude a finding of personal jurisdiction. Such a rule would enable a large corporation to do an enormous amount of trade with a forum state, but then claim it is not subject to general personal jurisdiction because that -- those amount of sales merely are a small percent of its overall sales. See Vencedor Manufacturing Co., Inc. v. Gougler Industries, 557 F.2d 886, 892 (1st Cir. 1977) where the court held that a company such as General Motors could argue that it is not subject to general personal jurisdiction in Puerto Rico because its sales there compose only a small percent of its national sales, and that sort of test would

not be logical.

So if the sales were in the millions of dollars, the Federal Circuit has indicated that those sales would be entitled to significant weight in a general personal jurisdiction analysis. See LSI, 232 F.3d at 1375 where the Federal Circuit found that general jurisdiction exists where a defendant sold millions of dollars worth of lighting, even though it only represented .64 percent of the total sales in the forum because there was also the presence of a broad distributorship there. The sales volume in this forum is nowhere near the seven figure range, and so this consideration is not applicable here.

Now besides the sales volume, the Court has considered documents that show Slocum Enterprises accepted and returned products for which New Jersey purchasers needed maintenance or repair. This activity, however, is incidental to the commercial activity described above. See Nichols, 991 F.2d at 1200 which found that something derivative of a solicitation within the forum state in itself would be insufficient to confer general personal jurisdiction. See also Modern Mailers, 844 F.Supp. at 1050-1051 where the court found even ongoing contact with repeat customers to be insufficient. See also L.H. Carbide, 852 F. Supp. at 1434 which found ongoing contact for customers to maintain the product and with assistance with the product among other

contacts was not sufficient to confer general personal jurisdiction.

Moreover, it appears that it was the New Jersey veterinarians, not Slocum, who initiated the communications out of a dissatisfaction with a product or the need for repair. Such activity in the forum, therefore, is not sufficiently systematic or continuous to confer general personal jurisdiction.

The Court now considers the website. And based on the way it's been described, the Court's understanding of its operation, the website also does not provide a basis for Slocum Enterprises to have exercised systematic and continued contacts through the website to support a finding of general personal jurisdiction.

For the purposes of general personal jurisdiction, courts look to the interactive nature of the website. In Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1124 (W.D.Pa. 1997) the United States District Court for the Western District of Pennsylvania described a sliding scale to determine if a commercial website submits its owner to personal jurisdiction. "At one end of the spectrum are situations where a defendant clearly does business over the internet. The defendant enters into contracts with residents of a forum jurisdiction that involve the knowing and repeated transmission of computer files over the internet, personal

jurisdiction is proper, e.g., CompuServe, Inc. v. Patterson, 89 F.3d. 1257 (6th Cir. 1996).

"At the opposite end are situations where a defendant had simply posted information on an internet website which is accessible to users in forum jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction, e.g. Bensusan Restaurant Corp. v. King, 937 F.Supp. 295 (S.D.N.Y. 1996).

"The middle ground is occupied by interactive websites where a user can exchange information with a host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and the commercial nature of the exchange of information that occurs on the website, e.g. Maritz, Inc. v. Cybergold, Inc., 947 F.Supp. 1328 (E.D.Mo. 1996)." And I quoted from Page 1124 of the Zippo case.

Other cases have applied the same sort of sliding scale. See, for example, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 at 418-419 (9th Cir. 1997), where the 9th Circuit held an internet advertisement alone isn't sufficient to confer personal jurisdiction over the advertiser. Transcraft Corp. v. Doonan Trailer Corp., Civ. No. 97-4943 1997 WL 733905 at Page 8 to 10 (N.D.Ill. Nov. 17, 1997), which held a website advertisement with an e-mail address for

inquiries was insufficient to subject a defendant to personal jurisdiction. CFOs To Go, Inc. v. CFO 2 Go, Inc., Civ. No. 97-4676 1998 WL 320821 at Pages 2 to 3 (N.D.Cal. June 5, 1998) held that a website with a description of the defendant's business and contact information did not amount to purposeful availment. Smith v. Hobby Lobby Stores, Inc., 968 F.Supp. 1356, 1364-65 (W.D.Ark. 1997). In that case, the District Court held that an advertisement in a trade publication over the internet was insufficient to trigger jurisdiction because it was not accompanied by a contract to sell any goods or services to the citizens in the forum over the website.

Notably in Zippo and in the cases that were cited in Zippo, those cases actually dealt with specific personal jurisdiction. Indeed, "The majority of these opinions focus either explicitly or implicitly on whether defendant's internet activities support and exercise a specific, rather than general, jurisdiction..." Dagesse v. Plant Hotel, NV, 113 F. Supp.2d 211, 220 (D.N.H. 2000). See also Molnlycke Health Care, AB v. Dumex Medical Surgical Products, Ltd., 64 F.Supp.2d 448, 452 Note 3 (E.D.Pa. 1999) where the District Court held, "Most of the cases premising jurisdiction over internet activity have ruled on the basis of specific jurisdiction." Coastal Video Communications Corp. v. Staywell Corp., 59 F.Supp.2d 562, 570 Note 6 (E.D.Va. 1999)

which noted that the vast majority of internet-based personal jurisdiction cases involve specific personal jurisdiction.

Plaintiff here is not arguing that the cause of action arises from or relates to the activities regarding the website. Thus, the question before the Court is whether the website constitutes a systematic and continuous contact with New Jersey to confer general personal jurisdiction.

Now as I noted, some courts have applied Zippo's sliding scale to a general personal jurisdiction analysis and have concluded that passive informational websites, websites through which one can request information are not sufficient to confer general personal jurisdiction over its owner. See for example, Somma Medical International v. Standard Chartered Bank, 196 F.3d 1292, 1295-1296 (10th Cir. 1999).

The Tenth Circuit there held the website at issue "does little more than make information available to those who are interested" and, therefore, does not represent sufficient contacts to confer general personal jurisdiction. Harbuck v. Aramco, Inc., Civ. No. 99-1971 1999 WL 999431 at Page 6 (E.D.Pa. Oct. 21, 1999). In that case, the District Court described the website stating, "The website does not provide users a place to order merchandise or services" and, therefore, it was described as passive and found that exercising personal jurisdiction on the basis of this contact would be unreasonable. Resnick v. Manfredy, 52 F.Supp.2d

462, 467-468 (E.D.Pa. 1999) holding the website offers merchandise for sale, but where the consumers must mail or call it in -- call in their orders is not sufficient contact with the forum to support general personal jurisdiction.

See also Weber v. Jolly Hotels, 977 F.Supp. 327, 334 (D.N.J. 1997). There the District Court held that advertising through passive website is "not tantamount to directing activity at or purposely availing oneself of a particular forum."

Some courts have held that even the maintenance of a very interactive website could not, without more, form the basis of general personal jurisdiction. In Molnlycke, 64 F.Supp.2d at 451, for example, the defendant's website advertised products, including a product that was the subject of the litigation, and the website permitted users to place their names and addresses on a mailing list to receive product information, and even permitted users to order the product directly from the website by clicking on any listed product, adding it to the shopping cart, completing an on-line order form, and supplying credit card information, but the District Court there held "the establishment of a website through which customers can order products does not, on its own...establish general jurisdiction." See the Molnlycke case at Page 451.

In its reasoning, the court envisions a scenario

where the possibility of ordering products from a website establishes general jurisdiction would effectively subject any defendant with such a website to general jurisdiction in every state. See the opinion at Page 451. See also Hy Cite Corp. v. Badbusinessbureau.com, LLC, 297 F.Supp.2d 1154, 1161-1162 (W.D.Wi. 2004). In that case, the court stated there was no personal jurisdiction over a defendant in a suit that arose from items posted on a website where plaintiff relied on only two contacts arising from the website itself, and where the defendant had no offices in the forum, its agents do not spend substantial time in the forum, and it does not do substantial business in the forum.

Slocum Enterprises' website in this case is largely informational. The site contains pages where a viewer can enter his or her contact information and lists a number of categories that attempt to educate its viewers about the products and seminars that Slocum Enterprises offers and contains a directory listing the T.P.L.O. certified veterinarians in the states in which they practice. Contrary to plaintiff's argument, the directory does not target any particular state. Indeed, the directory seems to list all of the 50 states in which the certified veterinarians reside or practice, and it is viewable over the internet from every state and every country that has access to the internet. The site does not invite New Jersey

consumers anymore than it invites any other consumers from any other state. It does not, for example, provide special incentives to New Jersey veterinarians. See Trintec, 395 F.3d at 1281 describing "the difficulty" in relying on the use of an interactive website to find personal jurisdiction over a defendant, and that the website was "not directed at customers in the [forum] but instead is available to all customers throughout the country who have access to the internet."

Thus, the website does not target New Jersey in particular. Moreover, to the extent it has interactivity; namely, to the extent it allows interested users to unilaterally enter their contact information to obtain more information about the product, or the procedure, or even to initiate e-mail communications, there has not been a showing by a preponderance of the evidence that any of the internet users, and further any of the New Jersey internet users, have actually accessed these mechanisms. To find personal jurisdiction absent such a slowing would subject Slocum Enterprises to general personal jurisdiction in every jurisdiction in the United States, even if there are no sales or resident licensed veterinarians located there, based on the possibility a user could enter his or her information and receive product information.

In the Court's view, this is inconsistent with due

process. See Hearst Corp. v. Goldberger, Civ. No. 96-3620 1997 WL 97097 at Page 20 (S.D.N.Y. Feb. 27, 1997). In that case, the Southern District of New York rejected the concept that every plaintiff should be able to sue any defendant in their home forum merely because the defendant maintains an internet website. See the Weber case, 1997 WL 574950 at Page 5 where the District Court held, "Advertising on the internet falls under the same rubric as advertising in a national magazine. This Circuit has consistently held that advertising in national publications do not constitute substantial contacts with the forum state." Internal quotation marks omitted.

Arguably, a national website is like a national publication that has cards that are inserted in the publication that one can pull out from the publication, fill in, and mail back to the entity who had the advertisement in that national publication. The Court is not aware of a case that that sort of behavior would be sufficient to cause one to find continuous and substantial contacts by virtue of the placing of that sort of advertisement, and that sort of interactivity.

It's important of course always to remember that while websites provide a new means for communication or of a sending of information, the analysis must still always harken back to whether there's a reasonableness that would be

consistent with due process in exercising jurisdiction.

The Court notes that the New Generation website, which apparently advertises product and may make its product available for sale is at least similar to the Slocum Enterprises website, and when the Oregon court had this case, it appears that New Generation, and the Court found -- or at least the Court found that the website was not sufficiently interactive to satisfy the purposeful availment requirement. See Slocum Enterprises, Inc. v. New Generation Devices, Civil No. 04-201 slip opinion at Page 18 (D.Or. Aug. 23, 2004). Thus, it would be inconsistent to treat websites that are being described very similarly differently for the purposes of a personal jurisdiction analysis.

Even considering the nature of the website along with Slocum Enterprises' New Jersey sales, the high showing of systematic and continuous contact with New Jersey has not been met. In Brown v. AST Sports Science, Inc. (phonetic), Civil No. 02-1682 2002 WL 32345935 at Page 8 (E.D.Pa. June 28, 2002) for example, the United States District Court for the Eastern District of Pennsylvania found a small number of Pennsylvania sales where defendant's website did not represent the continuous or purposeful contacts required for general jurisdiction, and that the sales themselves did not constitute a central part of defendant's business.

In Brown, the defendant's contacts consisted of

958 orders from the forum state, which accounted for 3.7 percent of its total orders. See the opinion at Page 2. The Court noted, "While these contacts may or may not have been sufficient for specific personal jurisdiction, the bar for general jurisdiction is set much higher than that for specific jurisdiction." See the Brown opinion at Page 6.

Accordingly, they rejected plaintiff's argument that general personal jurisdiction was proper over the defendant. See Page 8 of the opinion. Slocum Enterprises' website is less interactive than the website that was discussed in Brown. Indeed, there is no place on Slocum Enterprises' website to consummate a purchase it appears by entering, for example, credit card information. Rather, purchasers must send a separate e-mail, fax, or mail order to purchase the specified product.

Further, to the extent there is an e-mail address that a user can access, the invoices supplied to the Court did not reveal whether or not these orders were placed through e-mail, fax, regular mail, or telephone. Therefore, unlike the Brown case, the Court cannot truly gauge the extent to which the website allows Slocum Enterprises to sell its products to New Jersey residents.

Moreover, Enterprises's New Jersey sales represent less than 1 percent of its overall sales, while the defendant's sales within the forum in the Brown case

represented 3.7 percent of its overall sales. The Brown court found that the defendant sales within that forum fell short of the continuous and purposeful contacts that are required for personal jurisdiction. See the Brown opinion at Page 8. See also Hydro Engineering v. Landa, Inc. (phonetic), 231 F.Supp.2d 1131, 1133 to 1134 (D.Ut. 2002).

In that case, the District Court held general personal jurisdiction was improper over a defendant that maintained an informational website and sold 1.8 percent of its overall sales in the forum state. Likewise, this Court finds Enterprises' internet contacts, taken along with its sales to New Jersey residents, to be insufficient to meet the substantial systematic and continuous standard required for the finding of general personal jurisdiction.

Plaintiffs cited the Decker v. Circus Circus Hotel case, 49 F.Supp.2d 743, 748 (D.N.J. 1999) for the proposition that a court may exercise personal jurisdiction over a defendant based on the existence of a website "whereas here, the site is used to actively transact business and a user can exchange information with the host computer."

With respect to that citation, the Court first notes that Slocum Enterprises' website to be only slightly more than a passive website, and even considering its New Jersey sales, is not sufficient alone to support a finding of personal jurisdiction.

Second, in the Decker case, the District Court for the District of New Jersey suggests the maintenance of the website could support a finding of personal jurisdiction because "the defendants have effectively placed their hotel and its services into an endless stream of commerce." See the Decker case at Page 748, citing World-Wide Volkswagen at 444 U.S. at 298.

The stream of commerce theory, however, "is relevant only to the exercise of specific jurisdiction. It provides no basis for exercising general jurisdiction over a nonresident defendant." Purdue Research Foundation v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 789 (7th Cir. 2003). See also Alpine View Co., Ltd. v. Atlas Copco, A.B., 205 F.3d 208, 216 (5th Cir. 2000). In that case, the Appellate Court rejected "a party's reliance on the stream of commerce theory to support asserting general jurisdiction over a nonresident defendant." See also Simeone Ex Rel, Estate of Albert Francis Simeone, Jr. v. Bombardier-Rotax GMBH, 360 F.Supp.2d 665, 673-674 (E.D.Pa. 2005), Hy Cite. 297 F.Supp.2d at 1162.

In the Hy Cite case the court also rejected a plaintiff's reliance on the Decker case in support of an argument for general personal jurisdiction based upon a website.

Given that the only issue here at this point of the analysis is whether or not there is general personal

jurisdiction over the defendants, the defendant case does not apply.

While the Decker case suggests there could be personal jurisdiction over a defendant under a stream of commerce theory, it found there was no personal jurisdiction based on a forum selection clause in that particular case.

In any event, for all of these reasons, the Court is prepared to report to Judge Hayden that Slocum Enterprises' contacts with New Jersey are not sufficiently substantial, systematic, and continuous to support a finding of general personal jurisdiction over Slocum Enterprises.

I now turn to the analysis of whether there's general personal jurisdiction over Slocum Trust. Like Slocum Enterprises, Slocum Trust does not own property, pay taxes, or maintain offices or have employees in New Jersey. According to the record, the contacts that Slocum Trust has with New Jersey are through the user license agreements that have been executed over a period of several years. The Court must decide whether these contacts represent the type of systematic and continuous contact sufficient to support a finding of general personal jurisdiction.

In Bancroft & Masters, Inc. v. Augusta National, Inc., 223 F.3d 1082 (9th Cir. 2000) the Court of Appeals for the Ninth Circuit upheld the District Court's holding that a defendant who had licensing agreements with two TV networks

and a handful of California vendors still did not have sufficient contacts to support general personal jurisdiction. The Court reasoned that engaging in commerce with residents of the forum, without more, is the kind of activity that "approximates physical presence within the state's borders." See the opinion at Page 1086.

The Court contrasted the situation with that in the Perkins case, which I've already discussed, where the United States Supreme Court upheld Ohio's exercise of general jurisdiction over a company whose president worked out of an Ohio office from which he drew and distributed paychecks, from which he performed company's filings and correspondence, and in which regular directors meetings were held, and where the company had two bank accounts. See Perkins, 342 U.S. at 447-448.

Thus, the Bancroft court held that the defendant's limited contacts with California "constituted doing business with California, but do not constitute doing business in California." 223 F.3d at 1086 citing Helicopteros case, 466 U.S. at 418, and the emphasis has been added in the quote.

As in the Bancroft case, Slocum Trust has no contacts with New Jersey other than through the license agreement which was signed in Oregon with several New Jersey veterinarians. It's been represented that the total licensees is 11. There's nothing in the record to show that

the Trust solicited these agreements. Moreover, although the agreements suggest the opportunity for an ongoing relationship between the veterinarian and the Trust; namely, the right of the Trust to monitor the use of the patented products, and the obligation of the licensee to report infringing activity, there's nothing before the Court to show the Trust ever initiated further contact with any of the licensees.

Moreover, the user license agreements authorize the licensees to use the patented products anywhere. Presumably, the defendant could license a New Jersey veterinarian to use the product. That licensee could move to Alaska, for example, and under the plaintiff's theory, the defendant would be subject to general personal jurisdiction in that state. Such would not be considered purposeful availment, and for this reason, personal jurisdiction over the Trust is improper.

Lastly, the Trust has not "purposely availed" itself to New Jersey, because the user license agreement selected Oregon law in an Oregon forum to resolve disputes. I note that of course New Generation would not be subjected to that agreement, but the test for minimal contacts in the personal jurisdiction analysis has often been restated as a determination as to whether or not the defendant has "purposely availed itself" of the benefits and protection of

the forum state's laws. See Hanson v. Denckla, 357 U.S. 235, 253 (1958).

Where a party's dealings were governed by foreign law, courts have found it doubtful a defendant's actions constitute purposeful availment. See, for example, Marathon Oil Co. v. A.G. Ruhrgas, 182 F.3d 291, 295 (5th Cir. 1999) where the court noted the defendant could not have "reasonably expected to have been brought into Texas courts because of its presence at meetings inasmuch as the meetings and related communications dealt with...a contract governed" by foreign law. See Sea Lift, Inc. v. Refinadora Costarricense de Petrillio, S.A., 792 F.2d 989, 994 (11th Cir. 1986).

Even if the Slocum Trust user agreements with New Jersey veterinarians were to be considered sufficient for general jurisdiction, it cannot be said that they'd purposely availed themselves to New Jersey law. To the contrary, the defendants have sough to avoid New Jersey courts, and the courts of every other jurisdiction, other than Oregon. Indeed, had a dispute ever arisen under the user license agreement, either party would have been able to invoke the clause to apply Oregon law, and assuming other considerations were met, to transfer the case to the U.S. District Court for the District of Oregon if the case had been initiated in a forum other than that.

While the Court is mindful of the existence that such a clause does not preclude a finding of personal jurisdiction, see Deprenyl, 297 F.3d at 1354, the choice of law and choice of forum provisions, taken together with all of the reasons I've already articulated, militate against a finding of general personal jurisdiction over the Trust.

Therefore, the Court is prepared to report to the Honorable Kathryn S. Hayden that the Court lacks general personal jurisdiction over the Slocum Trust.

The Court now turns to the question of specific personal jurisdiction. In determining the existence of specific personal jurisdiction, the Court of Appeals for the Federal Circuit requires a court to consider whether or not; one, the defendant purposely directed its activities at the residence of the forum; two, the claim arises out of or relates to the defendant's activities with the forum; and three, assertion of personal jurisdiction is reasonable and fair. See Inamed, 249 F.3d at 1360, citing Akro Corp. v. Luker, 45 F.3d. 1541, 1545 (Fed. Cir. 1995).

The Federal Circuit explained in Inamed that "the first two factors correspond with the minimum contacts prongs of the International Shoe analysis and the third factor corresponds with the fair play and substantial prong of that analysis." 249 F.3d at 1359, internal quotation marks omitted, Silent Drive 326 F.3d at 1202 and Deprenyl, 297 F.3d

at 1351.

The first factor which is really -- comes from the Akro case, requires consideration of whether or not the defendants have directed contacts to New Jersey that should have caused them to reasonably anticipate being haled into court here. World-Wide Volkswagen, 444 U.S. at 297.

Here Slocum Enterprises sold products to New Jersey, albeit it less than 1 percent of its total sales, and the Trust maintains a nonexclusive license agreement with several New Jersey veterinarians. For the purposes of the specific personal jurisdiction analysis, the Court is going to assume that these contacts are purposeful.

With respect to the second Akro factor, the Court finds that the cause of action does not arise from or relate to the defendant's contacts with the New Jersey. The Federal Circuit has recognized that the disjunctive nature of the "arises out of or relates to" test indicates "added flexibility" and signals "a relaxation of the applicable standard" from a pure "arise out of" standard. See the Akro case, which was quoting Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201 at 206 (1st Cir. 1994).

This consideration is unique to the specific personal jurisdiction analysis and "insures that the element of causation remains in the forefront of the due process investigation" thereby allowing the Court to consider the

strength or weakness of the plaintiff's relatedness showing in deciding the fundamental fairness of allowing the suit to proceed. Ticketmaster-New York, 26 F.3d at 207.

In declaratory judgment actions such as this, the courts look to the defendant's contacts with the forum state. Many times these contacts involve infringement letters or litigation warnings from the patent holder to the declaratory judgment plaintiff in the forum state. Courts have largely held that such contacts without more are insufficient to sustain a finding of specific personal jurisdiction over the patent holder. See Akro, 45 F.3d at 1543.

In the Akro case, the court held that infringement letters in an exclusive licensing agreement that obligated defendant to defend the licensee for challenges to the patent's validity or enforceability were in that case sufficient to confer specific personal jurisdiction. Ryobi America Corp. v. Peters, 815 F.Supp. 172, 176 (D.S.C. 1993) which held that infringement letters without more cannot give rise to either general or specific jurisdiction. KDH Industries, Inc. v. Moore, 789 F.Supp. 69, 73 (D.R.I. 1991) which held that one or more letters which asserted certain patent rights could not give rise to personal jurisdiction either specific or general.

Now the Court notes that there is no such communication by the defendants to the plaintiff in this

case, but the Court did find those cases informative to the extent that it guided the Court to be clear that there needs to be a connection through the arises out of or related to prong of this litigation and the conduct of the defendants.

Plaintiffs argue that since its lawsuit seeks a declaratory judgment of non-infringement that the defendant's sales of patented products and user licensing agreements "are probative" and, therefore, specific personal jurisdiction is proper. See the plaintiff's brief at Page 16.

In their brief they cite VP Intellectual Properties, LLC v. Imtec Corp., Civ. No. 99-3136 1999 WL 11255204 at Page 5 (D.N.J. Dec. 9, 1999) for the proposition that "regardless of the quantity of products sold or the shipping method used, the sale of patented products, the buyers, and the forum, the state creates specific personal jurisdiction over an out-of-state seller." See their brief at Page 16.

I note that same quote was discussed here in open court today, and the Court already discussed with the plaintiff that the preceding sentence in the case states that, "In patent cases, the law is clear that where a defendant infringer is shown to have sold the allegedly infringing product in the forum state, the forum may exercise [specific] personal jurisdiction over the...defendant." See the VP Intellectual case at Page 5, citations omitted. And I

would like to add an emphasis under the words "defendant infringer." The Court had discussions with counsel about this very case and notes the argument that the plaintiff was making with respect to the value of the proposition for which it cited the VP Intellectual case.

What appears from the VP Intellectual case, however, is that the District Court was informed by the fact that it was dealing with the defendant's conduct; that is, the defendant infringer allegedly sold the infringing product in the forum state, and this gave the defendant his own actions "fair warning" that he could be hailed into a court in the forum state, as well that the forum in which the allegedly infringing product is sold has an interest in prohibiting the importation of infringing articles into the forum itself. Osteotech, Inc. v. Gensci Regenerations, Inc., 6 F.Supp.2d 349, 354 (D.N.J. 1998).

Here we do not have a plaintiff who has brought a patent infringement claim and thus Slocum Enterprises cannot be said to have sold any "allegedly infringing" products in New Jersey. Thus, the goal of prohibiting the importation of infringing articles into the forum is not present here as it was present in the VP Intellectual Properties case. Moreover, if the sales of a patented product were enough to confer jurisdiction over a patent holder, then a holder of a presumably valid patent would be amenable to declaratory

judgment actions for non-infringement or invalidity in any state in which it sold the patented product and this would not provide the patent holder sufficient fair warning to make it amenable to suit in a foreign jurisdiction. Accordingly, the VP Intellectual case is inapposite.

A declaratory judgment action is distinguishable from the action of VP Intellectual. Such an action seeks to declare the patent unenforceable and invalid, and a declaration that the plaintiff's product does not infringe. None of these allegations relate to the defendant's sale of its patented product and the plaintiff does not seek damages arising from such sales. Plaintiff's claims of invalidity, unenforceability, and non-infringement "neither arise out of nor relate to the activities in which [defendant] has engaged in order to exploit those patents, including producing and promoting products covered by the patents. Indeed [plaintiff] claims no injury flowing from [defendant's] production, marketing, and sales of its products. Accordingly, there does not appear to be any nexus between plaintiff's marketing and sale of its products in [the forum] and the subject matter of [plaintiff's] claims...which concern only the patent's validity and [its] own actions [defendant's] contacts with [the forum] likewise are not related to the operative facts of [plaintiff's] patent claims." Zumbro, Inc. v. California Natural Products, 861

F.Supp. 773, 780 (D.Minn. 1994) internal quotation marks omitted.

Under this reasoning, the Zumbro court held there was insufficient relationship between the defendant's patentees sales of patented products within the forum and the plaintiff's claims that sought declarations of non-infringement and invalidity. See also Ryobi, 815 F.Supp. at 176 noting in a patent action seeking declaration of invalidity and non-infringement "the essential transaction here is the granting of a patent in Washington, D.C. and [plaintiff's] subsequent manufacture of an allegedly infringing product." See also International Communications, Inc. v. Wavetech, Inc., 694 F.Supp. 1347, 1352 (E.D.Wi. 1988) where the District Court held that "the real source of plaintiff's cause of action is not the correspondence received, but the existence and ownership of the patent" and noting, "the defendant's ownership and use of the patent is not in any way connected with [the forum state]" See Ham v. LaCienega Music Co., 4 F.3d 413, 416 (5th Cir. 1993).

Now that was a copyright infringement declaratory action case, but there the court said the defendant's sale of products embodying the allegedly copyrighted materials within the forum where plaintiffs allege no injuries flowing from such sales were unrelated to the merits of whether or not the plaintiff infringed the copyright. See also Bountiful

Entertainment, Inc. v. Forever Blue Entertainment Group, Inc. (phonetic), 923 F.Supp. 950, 957 (S.D.Tx. 1996).

That was a copyright and trademark declaratory judgment action and the court noted, "It is not relevant for personal jurisdiction purposes the defendants Tradewinds and AMG are marketing their TV show directly here in Houston because an action for declaratory judgment for non-infringement does not arise out of or relate to the marketing activity."

Furthermore, the action does not implicate the license agreements between Slocum Trust and the New Jersey licensees for any kind of a breach of a sales contract between the Enterprises and a New Jersey purchaser. Rather, the issue here is whether or not New Generation products infringed one or more of the patents in suit and whether or not the patents are valid and enforceable. Thus, the conduct from which the action arises into which the action relates, in part, deals with New Generation's activity with respect to the infringement prong, and it deals with the defendant's activity in its patent with respect to validity and unenforceability.

To the extent plaintiff's claims seek a declaration of patent invalidity and unenforceability and, therefore, could seek to implicate the defendant's conduct, there's been no evidence that such conduct took place within

this forum. Indeed, conduct in procuring a patent occurred, I guess in part in Oregon, and certainly in Washington, D.C.

And as I stated at the outset of delivering this opinion, while the Court is prepared to report to the Honorable Kathryn S. Hayden that there appears to be no specific jurisdiction over either of the defendants and no general jurisdiction over either of the defendants, and recommend that Her Honor grant the motion to dismiss, it is going to delay issuing this recommendation to allow the parties to show cause why the case should or should not be transferred to a place that it could have otherwise been brought, such as Oregon or the District of Columbia. And the Court would ask for these letters by Thursday.

So I appreciate your patience while the Court delivered that opinion. The one thing that I did not deliver because of its length were a number of cases that talk about general jurisdiction and percentages of sales. And what the Court was trying to do is educate itself on what counts and what would be enough.

I'm certainly happy to read those into the record so you have them, but if you don't want them, I won't. So I leave it to you whether you want me to read them into the record. MR. FRISCIA: I don't think there's any need for it.

THE COURT: Counsel, is there any need for that?

MR. COOPER: I'd appreciate the cites.

THE COURT: Okay. Just give me a moment, please.

In the portion of the opinion where the Court was discussing the amount of contact courts look to, to determine whether there's sufficient contact for the exercise of general jurisdiction, aside from the cases read into the record, the Court did read the Hydro Engineering v. Landa case, 231 F.Supp.2d 1130, 1133-1134 (D.Ut. 2002). It also considered the Hockerson-Halberstadt, Inc. v. Costco Wholesale Corp., Civil No. 91-1720 2000 WL 726888 at Page 2 (E.D.La. June 5, 2000); Morrison Co. v. WCCO Belting, Inc., 35 F.Supp.2d 1293, 1296 (D.Kan. 1999); the VP Intellectual Property case we've already discussed; Barry v. Mortgage Services Acquisition Corp., 909 F.Supp. 65, 75-76 (D.R.I. 1995); the Bancroft case, which we've discussed at 45 F.Supp.2d 777 (N.D.Cal. 1998). I note for the record that the Ninth Circuit affirmed the general jurisdiction finding in Bancroft, but reversed on specific jurisdiction, 223 F.3d 1082, 1086; Hoss v. A.M. King Industries, Inc. (phonetic), 28 F.Supp.2d 644, 650 (D.Ut. 1998); Modern Mailers, which was a case we discussed in the opinion at pages -- 844 F.Supp. at 1050-1051; Roman v. Geissenburger Manufacturing Corp., 865 F.Supp. 255, 261 (E.D.Pa. 1994); the Nichols case, there was a partial reference to it in the opinion main, and the full cite is Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1200

(4th Cir. 1993).

So those are just another -- cases that talk about the kinds of contacts the courts look to when you're talking about sales, as well as other things like the presence of property, business representatives, visits to the District, and the like.

So I'll leave you to look at those if you choose to. So I thank you for your patience, and your arguments today, and your submissions. I hope we can find a home for you. That would be the good and right thing, but I look forward to seeing your submissions on this point. If you can come up with an agreement as to a location, dynamite, but at the very least I would like the benefit of your thoughts of whether there's a place this Court can transfer it to, and I just want to put one other thing on the record, so you're aware of it.

Despite the lack of personal jurisdiction, a District Court may transfer a case to a district where the case could have otherwise been brought. See 28 U.S.C. Sections 1404, 1406(a), and 1631. See also Goldlawr v. Heiman, 369 U.S. 463, 465 (1962), Verissimo v. Immigration and Naturalization Service, 204 F.Supp.2d 818, 820 (D.N.J. 2002).

1406 applies to any obstacle that might prevent the orderly and expeditious adjudication of a case on its

merits, including a lack of personal jurisdiction in an otherwise correct venue. Carteret Savings v. Shushan, 721 F.Supp. 705, 709 (1989).

1391 is the venue statute which we would look at of course in determining the proper venue, and there's certainly case authority that allows a court to exercise its sua sponte discretionary power to transfer a case to another district under any of these sections after determining it lacks personal jurisdiction, so long as the other provisions are satisfied.

So that's at least the legal authority that was I looking to, to see if I could find you a home. If you would like to consent to stay with us, we're happy to have you.

All terms of all the other orders will remain in effect until there's either an adoption of this report and recommendation or a transfer, and some other judge gives you a different scheduling order, so continue on that schedule.

Is there anything I can do for counsel today?

MR. FRISCIA: No, thank you, Your Honor.

THE COURT: Okay. Anything else, Counsel?

MR. COOPER: Thank you, Your Honor.

THE COURT: Okay. Thank you very much.

(Proceedings concluded)

I, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter on May 23, 2005, to the best of my knowledge and ability.

Date: 5/28/05
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